



## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS–R8–ES–2020–0151; FF09E21000 FXES1111090FEDR 223]

RIN 1018–BE33

### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Coastal Distinct Population Segment of the Pacific Marten

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose critical habitat for the coastal distinct population segment of Pacific marten (coastal marten) (*Martes caurina*), a mammal species from coastal California and Oregon, under the Endangered Species Act of 1973, as amended (Act). In total, approximately 1,413,305 acres (571,965 hectares) in northwestern California and southwestern Oregon fall within the boundaries of the proposed critical habitat designation. If we finalize this rule as proposed, it would extend the Act’s protections to this entity’s critical habitat.

**DATES:** We will accept comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments submitted electronically using the Federal eRulemaking Portal (see ADDRESSES below) must be received by 11:59 p.m. Eastern Time on the closing date.

We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter the docket number or RIN for this rulemaking (presented above in the document headings). For best results, do not copy and paste either number; instead, type the docket number or RIN into the Search box using hyphens. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on “Comment.”

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R8–ES–2020–0151; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Information Requested**, below, for more information).

*Availability of supporting materials*: The coordinates from which the critical habitat maps are generated will be included in the decisional record materials for this rulemaking and are available at <http://www.regulations.gov> under Docket No. FWS–R8–ES–2020–0151, and at the Arcata Ecological Services Field Office at <https://www.fws.gov/arcata> (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Service website and field office set out above, and may also be included in the preamble of this rule at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT**: Jenny Ericson, Acting Field Supervisor, U.S. Fish and Wildlife Service, Arcata Ecological Services Field Office, 1655 Heindon Road, Arcata, California 95521, or by telephone 707–822–7201. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at

## SUPPLEMENTARY INFORMATION:

### Executive Summary

*Scope of this rule.* The information presented in this proposed rule pertains only to the coastal distinct population segment (DPS) of Pacific marten (coastal marten). Any reference to the “species” within this document only applies to the DPS and not to the Pacific marten as a whole unless specifically expressed. A complete description of the DPS and area associated with the DPS is contained in the 12-month finding and the final listing rule for the coastal marten published in the *Federal Register* (80 FR 18742, April 7, 2015, and 85 FR 63806, October 8, 2020).

*Why we need to publish a rule.* Under the Act, to the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species. Designations and revisions of critical habitat can only be completed by issuing a rule. On October 8, 2020, we finalized listing the coastal marten as a threatened species in the *Federal Register* (85 FR 63806).

*What this document does.* This is a proposed rule to designate critical habitat for the coastal marten in 5 units in the States of Oregon and California totaling approximately 1,413,305 acres (ac) (571,965 hectares (ha)). In this proposed designation, we have identified a total of approximately 76,544 ac (30,975 ha) of private land and 26,126 ac (10,573 ha) of Tribal land that we are considering for exclusion from the final designation (see **Consideration of Impacts Under Section 4(b)(2) of the Act**).

*The basis for our action.* Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is

listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

*Draft economic analysis.* Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat, and make revisions thereto, on the basis of the best scientific data available and after taking into consideration the economic impact. In order to consider the economic impacts of critical habitat for the coastal marten, we drafted information pertaining to the potential incremental economic impacts for this proposed critical habitat designation. The information we used in determining the economic impacts of the proposed critical habitat is summarized in this proposed rule (see *Consideration of Economic Impacts*) and is available at <http://www.regulations.gov> at Docket No. FWS–R8–ES–2020–0151 and at the Arcata Fish and Wildlife Office at <http://www.fws.gov/arcata> (see **FOR FURTHER INFORMATION CONTACT**). We are soliciting public comments on the economic information provided and any other potential economic impact of the proposed designation. We will continue to reevaluate the potential economic impacts between this proposal and our final designation.

*Peer review.* In accordance with our peer review policy published in the *Federal Register* on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of 8 appropriate and independent knowledgeable individuals on our

Species Status Assessment (SSA) for the coastal marten (Service 2019a, entire). We received responses from two peer reviewers and two technical reviewers relating to the habitat and habitat needs of coastal marten, which informed the development of this proposed designation. We reviewed the comments we received for substantive issues and new information regarding habitat needs for the coastal marten. The specialists generally concurred with our description of habitat needs for the coastal marten and provided additional information, clarifications, and suggestions to improve the description. We used the SSA and specialists' comments on the SSA to inform our description and selection of areas we are proposing as critical habitat for the coastal marten. The peer and technical reviewers' comments are available at <http://www.regulations.gov> at Docket No. FWS-R8-ES-2018-0076, which was the docket for the listing rule (85 FR 63806, October 8, 2020). The purpose of peer review is to ensure that our critical habitat designations are based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise in the biology, habitat, and threats to the species.

We will solicit additional peer review of this proposed rule and respond to any peer review comments on the proposed designation in the final rule as appropriate.

### **Information Requested**

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) The coastal marten's biology and range; habitat requirements for feeding, breeding, and sheltering; and the locations of any additional populations.

(2) Specific information on:

(a) The amount and distribution of coastal marten habitat;

(b) What areas that were occupied at the time of listing and that contain the physical or biological features essential to the conservation of the coastal marten should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change;

(d) What areas not occupied at the time of listing are essential for the conservation of the species. We particularly seek comments:

(i) Regarding whether occupied areas are adequate for the conservation of the species; and

(ii) Providing specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the conservation of the species.

(e) Land ownership information, including land conservation status or management status. We particularly seek information on Tribal lands. Our spatial data information did not show any other Tribal lands within proposed critical habitat units beyond the ownership acreages listed below.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(5) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic

impacts.

(6) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act. In particular, provide information for areas with management plans or other mechanisms in place that identify measures to protect and conserve the coastal marten or its habitat, such as the areas managed by Green Diamond Resource Company and the Yurok Tribe.

(7) If you request exclusion from the designation of critical habitat of any areas under section 4(b)(2) of the Act, the Secretary will consider credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area, as provided in 50 CFR 17.90(c)(2)(i).

(8) As provided in our regulations, we are to identify in a proposed designation of critical habitat those areas that we are considering for exclusion. In this proposed rule under the section entitled **Exclusions**, we have indicated that we are considering areas managed by the Green Diamond Resource Company and by the Yurok Tribe for possible exclusion and explain why. Please provide information regarding Green Diamond Resource Company and the Yurok Tribe lands considered for exclusion.

(9) Information on the projected and reasonably likely impacts of climate change on the coastal marten's habitat.

(10) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(11) Information relating to species distribution or habitat modeling which is currently underway.

Please include sufficient documentation with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you present.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support our determination, as section 4(b)(2) of the Act directs that critical habitat designations must be made “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact.”

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov> (see **FOR FURTHER INFORMATION CONTACT**).

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), our final critical habitat designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, and may exclude some areas if



we find the benefits of exclusion outweigh the benefits of inclusion.

### *Public Hearing*

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the *Federal Register* and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the *Federal Register*. The use of these virtual public hearings is consistent with our regulation at 50 CFR 424.16(c)(3).

### **Previous Federal Actions**

On October 9, 2018, we proposed the coastal marten (83 FR 50574) as a threatened species under the Act and published our proposed rule in the *Federal Register*. On October 8, 2020, we published our final determination in the *Federal Register* (85 FR 63806), and added the coastal marten as threatened to the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h). All other previous Federal actions are described in the proposed rule to list the coastal marten as a threatened species under the Act (83 FR 50574, October 9, 2018). Please see that document for actions leading to this proposed designation of critical habitat.

In the final listing rule published in the *Federal Register* on October 8, 2020 (85 FR 63806), we erroneously listed the range of the coastal marten in Oregon as "OR (south-western)" in the List at 50 CFR 17.11(h). We are now proposing to correct the actual range of the DPS, which includes the entire coastal region of Oregon, and the change would appear in the List of Endangered and Threatened Wildlife as "OR

(western)” (see **Proposed Regulation Promulgation**).

## **Background**

### Supporting Documents

A species status assessment team prepared a SSA report for the coastal marten (Service 2019a, entire). The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species, as well as habitat needs for the species, which informed this critical habitat proposal. Information regarding peer review of the SSA is in our October 8, 2020, final listing determination (85 FR 63806). We also conducted an economic analysis on the incremental impacts of the proposed critical habitat designation (see Service 2019b, entire; IEc 2020, entire).

Although published too late to be included in our final listing determination (85 FR 63806, October 8, 2020), we are aware of research indicating that martens in coastal Oregon are of the Humboldt subspecies (*M. c. humboldtensis*), as are the martens in coastal northern California, and not the *caurina* subspecies (*M. c. caurina*), as previously classified (Schwartz *et al.* 2020, p. 179). While this research may result in a name change to the subspecific taxon of martens in coastal Oregon, it does not change our listable entity or DPS analysis. In essence, our coastal DPS of the Pacific marten remains valid, but in its entirety is now synonymous with the Humboldt marten subspecies. The change in nomenclature also does not affect our analysis of the status of and threats to the coastal marten, nor our analysis of critical habitat.

We evaluated all available data, published and unpublished, for Pacific martens within the coastal DPS. Where information gaps exist, we rely on Pacific marten information from outside the DPS, and occasionally from American martens (*Martes*

*americana*) elsewhere in North America. We use the general term “marten” when speaking about martens in general or applying information gleaned from martens across their range in North America. We reserve the term “coastal marten” for when we are referring exclusively to martens within the coastal DPS.

We are aware of species distribution modeling that is underway but was not available for inclusion in the analysis for this proposed rule. If this new information becomes available, it will be considered in the final determination of critical habitat.

### **Species Information**

The marten is a medium-sized carnivore related to weasels (*Mustela* sp.), minks (*Neovison* sp.), otters (*Lontra* sp.), and fishers (*Pekania* sp.). Martens have brown fur with distinctive coloration on the throat and upper chest that varies from orange to yellow to cream. They have proportionally large and distinctly triangular ears and a bushy long tail. Martens are territorial, and dominant males maintain home ranges that encompass one or more female’s home ranges. Martens have a generalist diet dominated by small mammals, but birds, insects, and fruits are also seasonally important. Martens across North America generally select older forest stands that are structurally complex (e.g., late-successional, old-growth, large-conifer, mature, late-seral). These forests generally have a mixture of old and large trees, multiple canopy layers, snags and other decay elements, dense understory, and have a biologically complex structure and composition. A thorough review and assessment of the taxonomy, life history, and ecology, including limiting factors and species resource needs of the coastal marten is presented in the SSA report (Service 2019a, entire) (available at <https://www.fws.gov/arcata/> and at <http://www.regulations.gov> under Docket No. FWS–R8–ES–2018–0076).

### **Critical Habitat**

Critical habitat is defined in section 3 of the Act as:

- (1) The specific areas within the geographical area occupied by the species, at the

time it is listed in accordance with the Act, on which are found those physical or biological features

- (a) Essential to the conservation of the species, and
  - (b) Which may require special management considerations or protection; and
- (2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as: An area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and translocation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area.

Designation also does not allow the government or public to access private lands, nor does designation require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement “reasonable and prudent alternatives” to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act’s definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features: (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the *Federal Register* on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species, the recovery plan for the species, articles in peer-

reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

### **Prudency Determination**

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary

may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed in the final listing rule (85 FR 63806, October 8, 2020), there is currently no imminent threat of take attributed to collection or vandalism identified under Factor B (16 U.S.C. 1533(a)(1)(B)) for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA and final listing rule for the coastal marten, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to the coastal marten and that those threats in some way can be addressed by section 7(a)(2) consultation measures. The species occurs wholly in the jurisdiction of the United States, and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because there are no other circumstances the Secretary has identified for which this designation of critical habitat would be not prudent, we have determined that the



designation of critical habitat is prudent for the coastal marten.

### **Critical Habitat Determinability**

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the coastal marten is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of “critical habitat.”

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

In our proposed listing rule (83 FR 50574, October 9, 2018), we stated that critical habitat was not determinable because the assessment of the economic impacts of the designation were still ongoing and we were in the process of acquiring the complex information needed to perform that assessment. We have now obtained that information and completed an economic analysis of the proposed critical habitat. In addition, we reviewed the available information pertaining to the biological needs of the species and habitat characteristics where these species are located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the coastal marten.

### **Physical or Biological Features Essential to the Conservation of the Species**

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that

may require special management considerations or protection. The regulations at 50 CFR 424.02 define “physical or biological features essential to the conservation of the species” as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration or predator avoidance, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include but are not limited to space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Details on habitat characteristics for the Pacific marten can be found in the SSA (Service 2019a, pp. 24–35) and Slauson *et al.* (2019a, pp. 47–63). We summarize below the more important habitat characteristics, particularly those that support the description of physical and biological features essential to the conservation of the coastal marten DPS. We also describe habitat features relative to the scale at which coastal martens use these features, allowing us to more logically organize the physical and biological features. Greater detail can be found elsewhere (Slauson *et al.* 2019a, pp. 47–59; Service 2019a, pp. 24–34), but we summarize these scales as follows: At the site scale, coastal martens look for structures and surrounding features that accommodate activities such as denning and resting (see *Cover or Shelter*). At the stand scale, coastal martens select forest stands with the structural features that provide one or more life-history requirements (e.g., features that support marten prey populations, allow prey to be vulnerable to martens, provide structures for denning and resting, and provide cover). At the home range scale, coastal martens position their home ranges to include enough high-quality habitat to provide for life-history needs (e.g., foraging, reproduction, and cover) and access to mates, while avoiding other coastal martens of the same sex, as well as avoiding competitors and predators. The distribution of suitable habitat at the landscape scale influences coastal marten dispersal, location of coastal marten home ranges, and population density. Coastal marten dispersal across the landscape allows for gene flow and maintains adjacent populations (or metapopulation structure where it exists); dispersing individuals select suitable portions of the landscape that are unoccupied by individuals of the same sex to establish home ranges (Slauson *et al.* 2019a, p. 48).

#### *Space for Individual and Population Growth and for Normal Behavior*

Coastal martens are solitary animals except during mating and when females are raising young. They establish home ranges in areas that provide enough habitat to support their life-history needs (Table 1), allow access to mates, and avoid individuals of the

same sex (Slauson *et al.* 2019a, pp. 47–48). Coastal marten home ranges typically include a high proportion (greater than or equal to 70 percent) of older forest habitat, and both males and females appear to spend a majority of their time in this habitat (Service 2019, p. 30). The older forest habitats used by coastal martens typically have large amounts of the features necessary for cover, foraging, resting, and denning (see descriptions of specific features under the headings immediately below), such as large trees or snags with decay elements, down wood, and dense ericaceous shrub understories.

TABLE 1—LIFE HISTORY AND RESOURCE NEEDS OF THE COASTAL MARTEN

Life Stage	Resources and/or circumstances needed for individuals to complete each life stage
Kit (birth to dispersal, ~6 months)	<ul style="list-style-type: none"> <li>● <b>Female</b> provides food, thermal source, and protection from predators. (Markley and Bassett 1942, pp. 606–607)</li> <li>● <b>Den sites</b> are enclosed areas to shelter from weather and predators and are most often large diameter trees (live or dead) with cavities, but also include hollow logs, crevices under rocks, log piles, and squirrel nests. (Slauson and Zielinski 2009, p. 40; Thompson <i>et al.</i> 2012, pp. 223–224; Moriarty 2017a, pp. 82–88)</li> </ul>
Juvenile and Adults 2+ years	<ul style="list-style-type: none"> <li>● <b>Dispersal habitat</b> is an area that supports movement from natal area to a location where home range can be established. (Chapin <i>et al.</i> 1998, pp. 1334–1336; Johnson <i>et al.</i> 2009, p. 3365)</li> <li>● <b>Resting sites</b> include cavities, brooms, hollow logs, large limbs, rock crevices, and debris piles and are used to conserve energy and avoid predators. (Taylor and Buskirk 1994, pp. 253–255; Shumacher 1999, pp. 26–58; Slauson and Zielinski 2009, pp. 39–40; 223–224; Thompson <i>et al.</i> 2012, pp. 223–224; Early <i>et al.</i> 2017, entire)</li> <li>● <b>Food</b> consists primarily of squirrels and chipmunks, birds, berries and insects seasonally. (Slauson and Zielinski 2017, entire; Slauson and Zielinski 2019, entire; Eriksson <i>et al.</i> 2019, entire)</li> <li>● <b>Understory</b> consists of dense shrub layer and decayed wood structures providing prey habitat. Shrub layer also provides protection from predators. (Andruskiw <i>et al.</i> 2008, pp. 2275–2277; Slauson and Zielinski 2009, pp. 39–42; Eriksson 2016, pp. 19–23)</li> <li>● <b>Forest canopy cover</b> provides protection from aerial and terrestrial predators. Unfragmented habitat excludes bobcats, the primary predator of coastal marten, which are found in more fragmented landscapes (Slauson and Zielinski 2001, entire; Powell <i>et al.</i> 2003, entire; Linnell <i>et al.</i> 2018, p. 10; Slauson <i>et al.</i>, <i>in prep</i>)</li> </ul>

- |  |   |
|--|---|
|  | <ul style="list-style-type: none"> <li>● <b>Home range</b> is habitat that provides an adequate mix of resting and foraging habitat and overlap with opposite sex individuals to provide breeding season encounters. (Ellis 1998 pp. 35–41; Bull and Heater 2001, p. 1; Self and Kerns 2001, p. 5; Slauson 2003, pp. 49–54; Moriarty <i>et al.</i> 2017b, pp. 684–686; Linnell <i>et al.</i> 2018, p. 10; Slauson <i>et al.</i> 2019a, entire)</li> </ul> |
|--|---|

Martens occupying shore pine (*Pinus contorta* spp. *contorta*) habitat in coastal Oregon have the smallest home ranges recorded in North America, with average sizes of 0.32 square miles (mi<sup>2</sup>) (0.84 square kilometers (km<sup>2</sup>)) and 1.18 mi<sup>2</sup> (3.06 km<sup>2</sup>) for females and males, respectively (Moriarty *et al.* 2017b, p. 685). Limited data from martens in northern California (3 adult males) show home range sizes from 1.2 to 1.5 mi<sup>2</sup> (3 to 4 km<sup>2</sup>), which is similar to home range sizes of Pacific martens in the Sierra Nevada Range elsewhere in California (Slauson *et al.* 2019a, p. 56).

Dispersal is the means by which marten populations maintain and expand their distribution and population size. Successful dispersal requires functional connections between habitat patches capable of supporting reproduction across the landscape. Hence, individual martens disperse by selecting portions of the landscape that facilitate movement and searching for an area in which to select a home range that does not overlap with same-sex individuals. Where landscapes are heavily disturbed through intensive logging, juvenile dispersal may be especially costly, as evidenced by lower survival and poorer body condition of martens dispersing through regenerating vs uncut landscapes (Johnson *et al.* 2009, pp. 3364–3366). Little else is known about what constitutes dispersal habitat for martens, but the combination of reduced foraging efficiency and increased predation risk in predominantly clearcut landscapes may strongly influence dispersal dynamics of martens. (Service 2019a, pp. 22, 33, 58).

#### *Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements*

Martens are dietary generalists. Small mammals dominate their diet year round,

with some mammal species varying by season. Birds, insects, and fruits are also seasonally important. Habitat characteristics associated with marten prey are important to provide a food source for martens. Many of the small mammal species that martens prey on reach their highest densities in forest stands with mature and late-successional structural features; in these stands, the food resources used by marten prey species, such as conifer seeds and truffles, are most abundant. In addition, other features associated with increased densities or abundances of marten prey species include increased density and complexity of ericaceous shrub layers, increased amounts of coarse woody debris, and density of large snags. Structural complexity on the forest floor improves predation success for martens. In the shore pine forest community of the central coastal Oregon population, areas with an ericaceous understory had a significantly higher relative abundance of marten prey species, and had a significantly more diverse assemblage of prey species compared to nearby interior forests (Eriksson 2016, p. 16). Many of the bird species found in marten diets are also associated with shrub understories, and these birds feed on the fruits of ericaceous shrub species (Service 2019a, pp. 22–24; Slauson *et al.* 2019a, pp. 33–36).

#### *Cover or Shelter*

Bobcats (*Lynx rufus*) and other felids are the primary predators documented for coastal martens (Slauson *et al.* 2014, p. 2; Slauson *et al.* 2019a, p. 40). Other large-bodied mammalian (e.g., coyotes (*Canis latrans*)) and avian (e.g., raptors and owls) predators co-occur with and prey upon martens across North America (Clark *et al.* 1987, p. 4; Buskirk and Ruggiero 1994, p. 28). Avoiding these predators has shaped marten behavior and likely influences their selection of highly complex forest structure for cover and shelter while avoiding areas lacking overhead or escape cover that are more typically occupied by generalist predators such as bobcats and coyotes (Slauson *et al.* 2019a, pp. 38–40). Cover and shelter also provide protection from the physical elements and allow

martens to maintain their body temperature (thermoregulation).

Martens seek out cover and shelter at several scales. At the site scale, they look for structures and surrounding features that accommodate denning and resting. Denning sites are used by females for birthing and raising their kits (see *Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring*). Resting sites are used by both sexes on a daily basis, and martens seek them out between foraging bouts to provide thermoregulatory benefits and protection from predators (Taylor and Buskirk 1994, p. 255; Slauson *et al.* 2019a, p. 48). Martens need many resting structures distributed across their home range to meet seasonal changes in thermoregulatory needs. Martens primarily use large-diameter live trees, snags, and down logs, which are typically the largest available structures in the area. Within these structures, martens commonly rest either in cavities, formations caused by forest pathogens such as dwarf mistletoe (*Arceuthobium* spp.), or on platforms such as broken-top snags or large live branches. Cavities may become more important during the winter when conditions are wetter and colder. Less-frequented but still important resting structures include large slash piles with large-diameter logs, natural rock piles, and shrub clumps (Slauson *et al.* 2019a, pp. 48–50). In less productive shore pine communities in coastal Oregon, where large down wood and large standing trees and snags are not as common, martens have been most commonly found resting in squirrel nests, but also use bare branches and hollows at the base of overturned trees (Service 2019a, p. 25).

At larger scales (stand, home range, and landscape), martens need sufficient habitat, such as overhead and escape cover, to minimize their exposure to predators as they move through their home range or disperse across the landscape. Martens tend to avoid forest openings and landscapes with large areas of forest openings. An analysis of martens across North America found that individual home ranges typically contain a large proportion (greater than or equal to 70 percent) of suitable habitat; furthermore,

marten density declines when the area of suitable habitat across the landscape is reduced to less than 70 percent as a result of wildfire, forest management, or other stand-replacing disturbance (Thompson *et al.* 2012, pp. 209, 217, 228).

Within the coastal marten DPS, on sites with highly productive soil conditions, martens select old-growth and late-mature stands dominated by Douglas-fir overstories; these stands have dense (greater than 70 percent cover) shrub layers that are spatially extensive and dominated by ericaceous species, including but not limited to evergreen huckleberry (*Vaccinium ovatum*), salal (*Gaultheria shallon*), and *Rhododendron* sp. (Slauson *et al.* 2019a, p. 51). On less productive sites, (e.g., serpentine soils and coastal shore pine communities), the amount of overstory cover may be more variable, but the dense understory characteristics remain similar to productive sites (Slauson *et al.* 2019a, pp. 51–53). Martens favor shrub communities that comprise shade-tolerant, long-lived, mast-producing species that maintain site dominance, rather than early-seral shrub communities that are dominant only for short periods after a disturbance (e.g., *Ceanothus* sp.) (Slauson *et al.* 2019a, p. 9).

Occupying home ranges with large amounts of overhead cover provided by shrub or forest canopy is thought to reduce marten exposure to predators. In addition, occupying landscapes with similarly large amounts of mature or old forest cover with complex understory minimizes their distributional overlap with generalist predators that are typically associated with younger forests or more open habitats (Slauson *et al.* 2019a, p. 40). Mature and old-forest characteristics differ across the DPS depending on the site and plant association. Old-forest characteristics of example plant series are provided in Table 2; however, old-forest conditions in other plant series within critical habitat units may also provide sufficient habitat.

TABLE 2—CHARACTERISTICS OF OLD-GROWTH STANDS IN A SAMPLE OF DIFFERENT PLANT SERIES THAT OCCUR WITHIN THE DPS



Stand feature	Douglas-fir on western hemlock sites <sup>a</sup> Minimum old-growth values	Douglas-fir plant series <sup>b</sup> Mean old-growth values	Tanoak plant series <sup>b</sup> Mean old-growth values
Live trees	≥2 species. Wide range of ages and sizes  Douglas-fir ≥8/ac >32-in diameter (≥20/ha >81 cm) or >200 years old	Wide range of size classes:  Softwood trees 8/ac 30- to 39.9-in diameter (≥20/ha 76 to 101.5 cm), and 9/ac >40" diameter (22/ha >101.5 cm)	Wide range of size classes.  Softwood trees 8/ac 30- to 39.9-in diameter (≥20/ha 76 to 101.5 cm), and 2/ac >40" diameter (5/ha >101.5 cm)
Canopy	deep, multi-layered canopy		
Snags	Conifers ≥4/ac >20" diameter (10/ha > 51 cm) and >15 ft (4.5 m) tall	2.4/ac >20" diameter (5.9/ha > 51 cm) and >50 ft (4.5 m) tall	1.6/ac >20" diameter (4.0/ha > 51 cm) and >50 ft (4.5 m) tall
Logs	≥15 tons/ac (34 metric tons/ha) including 4 pieces/ac ≥24" diameter (10/ha ≥ 61 cm) and >50 ft (15 m) long	24.2 tons/ac (54.5 metric tons/ha) of logs >10 in (25 cm) diameter and >1 ft (0.3 m) long  6.9 logs/ac (17.0 logs/ha) >20 in (51 cm) and <30 in (76 cm) diameter; 3.8 logs/ac (9.4 logs/ha) >30 in (76 cm) diameter	23.8 tons/ac (53.5 metric tons/ha) of logs >10 in (25 cm) diameter and >1 ft (0.3 m) long  6.5 logs/ac (16.1 logs/ha) >20 in (51 cm) and <30 in (76 cm) diameter; 3.9 logs/ac (9.6 logs/ha) >30 in (76 cm) diameter

<sup>a</sup>Minimum old-growth definitions found in Franklin *et al.* (1986, p. 4).

<sup>b</sup>Mean old-growth definitions found in Jimerson *et al.* (1996, pp. E-16 to E-23).

### *Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring*

Females give birth to kits in forest structures called natal dens. Subsequent structures used to raise young kits are called maternal dens. The most common den structures used by martens across North America are cavities in large-diameter live and dead trees, and known coastal marten dens also correspond to this pattern. Trees containing marten den sites are structurally complex, with large limbs, broken tops, hollow bases, complex crowns, or multiple cavities. Martens appear to be more selective of habitat conditions at den sites than at rest sites; this tendency likely reflects a need for

foraging habitat to be within close proximity of a den site, allowing females to minimize energy expenditure for foraging and minimize time spent away from kits (Service 2019a, pp. 26–27; Slauson *et al.* 2019a, p. 50).

### *Habitats Protected from Disturbance*

As noted above in the *Cover or Shelter* section, mature and old forests are important to martens, and marten density declines when landscape amounts are reduced to less than 70 percent of the area, regardless of the disturbance type (Thompson *et al.* 2012, pp. 209, 217, 228). Marten habitat is lost or degraded through natural disturbances and human-induced changes. Such disturbances can remove habitat components necessary for marten fitness (e.g., canopy cover, denning and resting structures, habitat for marten prey). In California, habitat disturbances that remove escape cover and create extensive openings are associated with increased predation risk by increasing the abundance of habitat generalist carnivores that prey on martens (Slauson *et al.* 2019a, pp. 40, 57).

Forest management is the human disturbance that has the greatest effect on marten habitat in terms of scale and severity. The loss of marten habitat as a result of timber harvest is considered the likely cause of the continued low population levels in California since the State banned trapping in 1946. Vegetation management, such as timber harvest, thinning, fuels reduction, and non-forest habitat restoration can result in temporary or permanent loss, degradation, or fragmentation of suitable coastal marten habitat (Service 2019a, p. 55). Human development also results in permanent habitat conversion, but is generally limited in scope to the area around established communities and existing developments.

Within the DPS, wildfire is the natural disturbance that affects by far the greatest area of habitat. Fires are a necessary disturbance feature as they create or facilitate the development of structural features used by martens, such as snags, hollow trees, and

down logs. However, fires can also remove large areas of suitable marten habitat that can take many decades to recover (Service 2019a, pp. 48–51). Other natural disturbances that affect marten habitat to a much lesser degree than wildfire include windstorms, landslides, and forest insects and pathogens. These events generally degrade or remove habitat in localized areas. Similar to wildfire, however, they are also important processes for developing forest structures used by coastal martens, such as broken top trees, cavities, and down wood.

#### *Summary of Physical or Biological Features for the Coastal Marten*

We derive the specific physical or biological features (PBFs) essential to the conservation of the coastal marten from studies of this species' habitat, ecology, and life history as described in the SSA report for the coastal marten (Service 2019a, entire). We have determined that the following PBFs are essential to the conservation of the coastal marten:

*Physical or Biological Feature 1*—Habitat that supports a coastal marten home range by providing for breeding, denning, resting, or foraging. This habitat provides cover and shelter to facilitate thermoregulation and reduce predation risk, foraging sources for marten prey, and structures that provide resting and denning sites. To provide cover and support denning, resting, and foraging, coastal martens require a mature forest overstory, dense understory development, and biologically complex structure that contains snags, logs, other decay elements, or other structures that support denning, resting, or marten prey. Stands meeting the conditions for PBF 1 would also function as meeting PBF 2 (facilitating movement within and between coastal marten home ranges). Stands meeting the condition for PBF 1 contain each of the following three components:

- (1) *Mature, conifer-dominated forest overstory.* Overstory canopy cover provides protection to coastal martens from aerial and terrestrial predators, as well as shelter from physical elements such as sun or storms. It also is the source of structural

features that coastal martens use for denning and resting, and provides suitable coastal marten prey. Suitable overstory conditions vary depending on the productivity of the site as follows:

a. For areas with relatively low productivity (e.g., areas where growing conditions are harsher, such as serpentine sites or coastal shore pine forests, compared to other areas), suitable forest overstory conditions are highly variable. They may contain a sparse conifer overstory, such as in some serpentine areas, or a dense conifer overstory composed mainly of trees smaller than the typical older forest conditions described below in (1)b (e.g., the dense shore pine overstory found in areas occupied by marten along the Oregon coast).

b. For other areas with higher productivity, martens tend to favor forest stands in the old-growth or late-mature seral stages. The specific forest composition and structure conditions found in higher productivity areas will vary by plant series and site class. Structural and composition descriptions of old-growth or late-mature seral stages for local plant community series should be used where available. In general these stands exhibit high levels of canopy cover and structural diversity in the form of: (1) a wide range of tree sizes, including trees with large diameter and height; (2) deep, dense tree canopies with multiple canopy layers and irregular tree crowns; (3) high numbers of snags, including large-diameter snags; and (4) abundant down wood, including large logs, ideally in a variety of decay stages.

(2) *Dense, spatially extensive shrub layer.* The shrub layer should be greater than 70 percent of the area, comprising mainly shade-tolerant, long-lived, mast-producing species (primarily ericaceous species such as salal, huckleberry, or rhododendron, as well as shrub oaks). An extensive layer of dense shrubs provides protection and cover from coastal marten predators. In addition, ericaceous and mast-producing shrubs provide forage for marten prey.

(3) *Stands with structural features.* Structural features that support denning or resting, such as large down logs, rock piles with interstitial spaces, and large snags or live trees with decay elements or suitable resting structures (e.g., hollows and cavities, forked or broken tops, dead tops, brooms from mistletoe or other tree pathogens, or large platforms including abandoned nests). These features provide cover and thermal protection for kits and denning females, and for all animals when they are resting between foraging bouts. Hence, these features need to be distributed throughout a coastal marten home range. They also tend to be among the largest structures in the stand. Many of these features, such as down logs and snags or live trees with decayed elements, also support coastal marten prey.

*Physical or Biological Feature 2*—Habitat that allows for movement within home ranges among stands that meet PBF 1, or supports individuals dispersing between home ranges. Habitat within PBF 2 includes: (1) stands that meet all three conditions of PBF1; (2) forest stands that only meet the first two components of PBF 1 (mature, conifer-dominated forest overstory and a dense, spatially extensive shrub layer); or (3), habitats with some lesser amounts of shrub, canopy, forest cover, or lesser amounts of smaller structural features as described in PBF 1, and while not meeting the definition of PBF 1, would still provide forage and cover from predators that would allow coastal martens to traverse the landscape to areas of higher quality habitat.

#### *Special Management Considerations or Protection*

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the following direct or indirect threats: incidents of roadkill; inadvertent poisoning from rodenticides;

predation; disease; impacts from wildfire; and vegetation management actions. A detailed discussion of activities influencing the coastal marten and its habitat can be found in the final listing rule (85 FR 63806, October 8, 2020). Special management considerations or protection that may be required within critical habitat areas to address these threats include (but are not limited to) the following: development of wildlife crossings on major roadways; monitoring and patrolling for unauthorized use of rodenticides in agricultural settings including cannabis operations; maintaining adequate cover and connectivity of habitats to provide cover from predation; implementation of forest management practices that prevent or reduce risk of catastrophic wildfire; reducing indirect impacts to coastal marten habitat from activities adjacent to critical habitat units; and minimizing habitat disturbance, fragmentation, and destruction through use of best management practices for vegetation management activities and providing appropriate buffers around coastal marten habitat.

## **Conservation Strategy and Selection Criteria Used To Identify Critical Habitat**

### *Conservation Strategy*

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species because we have not identified any unoccupied areas that meet the definition of critical habitat. The occupied areas identified encompass the varying habitat types and distribution of the species and provide sufficient habitat to allow for maintaining and potentially expanding the populations.

To determine and select appropriate occupied areas that contain the physical or biological features essential to the conservation of the species or areas otherwise essential for the conservation of the coastal marten, we developed a conservation strategy for the species. The goal of our conservation strategy for the coastal marten is to recover the species to the point where the protections of the Act are no longer necessary. The role of critical habitat in achieving this conservation goal is to identify the specific areas within the coastal marten's range that provide essential physical and biological features without which the coastal marten's range-wide resiliency, redundancy, and representation could not be achieved. This, in turn, requires an understanding of the fundamental parameters of the species' biology and ecology based on well-accepted conservation-biology and ecological principles for conserving species and their habitats, such as those described by Carroll *et al.* 1996 (pp. 1–12); Shaffer and Stein 2000 (pp. 301–321); Natural Resources Conservation Service (NRCS) 2004 (entire); Tear *et al.* 2005 (pp. 835–849); Groom *et al.* 2006 (pp. 419–551); Redford *et al.* 2011 (pp. 39–48); and Wolf *et al.* 2015 (pp. 200–207); and more specific coastal marten habitat information such as that described in Moriarty *et al.* 2016 (pp. 71–81); Delheimer *et al.* 2018 (pp. 510–517); Linnell *et al.* 2018 (pp. 1–21); Moriarty *et al.* 2019 (pp. 1–25); and Slauson *et al.* (2019a, entire).

In developing our conservation strategy, we focused on increasing the resiliency, representation, and redundancy of coastal marten populations by maintaining and improving extant marten populations and suitable habitat. Because coastal marten occur in small and isolated populations, the primary focus of the conservation strategy is to maintain and expand extant populations and suitable habitat within those population areas. Suitable habitat includes areas for cover, resting, denning and foraging and also provides for dispersal habitat when breeding or food resources may not be optimal. To maintain redundancy of coastal marten populations, the conservation strategy also focuses on providing for areas in the diversity of habitats that coastal martens have been

documented to use. This includes mesic serpentine, coastal shore pine, and late-seral coniferous forests. These habitats are spread across the species' range and typically provide the physical and biological features essential to the conservation of the species without which range-wide resiliency, redundancy, and representation of the species could not be achieved. As explained further below, this focus led to the inclusion of suitable habitat within the ecological settings where the species occurs as part of the conservation strategy.

#### *Selection Criteria and Methodology Used to Determine Critical Habitat*

As discussed above, to assist in determining which areas to identify as critical habitat for the coastal marten, we focused our selection on extant populations in the diversity of habitats represented by coastal marten. We define the proposed critical habitat as sites that contain the physical or biological features essential to the conservation of the species within the geographical area occupied by the species at the time of listing.

To define the areas we consider to be the areas occupied at the time of listing, we started with a set of detection points and grouped detections into extant population areas (EPAs). The EPAs and the habitat areas adjacent to and within dispersal distance between the EPAs encompass the core areas we consider to be occupied at the time of listing. All current verifiable coastal marten detections were used to delineate EPAs within the historical home range. If the total number of detections in an area was less than five or they were separated by greater than 3 mi (5 km) from other verifiable detections, the combined detections were not designated as an EPA due to the insufficient level of information to suggest a likely self-sustaining population (Service 2019a, p. 84). EPAs were considered separate from each other if they were not within 4.6 mi (7.5 km) of each other, which is based on half of the average dispersal distance of a coastal marten. This distance assumes that animals are not regularly moving between EPAs and the EPAs are



functioning as separate populations. To better focus the areas occupied at the time of listing and considered to be essential to the conservation of the species, we refined the boundaries of the EPAs using a 60 percent concave hull method to select those areas with a higher prevalence of coastal marten detections.

Because the EPAs are based on occurrence records and not habitat, we also used two different habitat models specific to coastal marten to incorporate the habitat used by the coastal marten detections associated with each EPA. These modeled areas are considered occupied by the species based on the continuous nature of the habitat and are within the dispersal distance and home ranges of the species. The first model we used found that coastal martens were positively associated with Old-Growth Structural Index (OGSI), precipitation, and serpentine soils, and negatively with elevation (Slauson *et al.* 2019b, entire). OGSI is a spatial data layer developed by the U.S. Forest Service (USFS) and Oregon State University and is an index of one to four measurable old-growth structure elements including (1) density of large live trees, (2) diversity of live-tree size classes, (3) density of large snags, and (4) percentage cover of down woody material (Davis *et al.* 2015, p. 16). OGSI serves as a surrogate for the late-seral structural features that are important to coastal marten survival and, in conjunction with the serpentine soil layer, incorporates several of the PBFs defined above. The inclusion of precipitation in the model accounts for the association of the mesic shrub layer that martens depend on for cover, resting, and foraging.

We also used a habitat connectivity model developed by the Service that incorporates OGSI data along with a minimum patch size of habitat to create ‘cores’ of suitable habitat (Schrott and Shinn 2020, entire). We used our model in conjunction with the Slauson *et al.* 2019b model because the Slauson model does not include low elevation areas known to be occupied by coastal martens. The Service model includes modeled output in lower elevation coastal regions of California and Oregon where we know

coastal marten occur. Because the entire combined modeled extent of habitat overestimates the amount of habitat used by and needed for coastal marten conservation, we eliminated any modeled areas that were not adjacent to EPAs and eliminated modeled output in arid environments east of the Klamath River in California where suitable habitat is more scarce and localized to moist ravines. In addition, we trimmed the polygons where there were long tendrils displaying high edge-to-interior ratio that were generally artifacts of roads, modeled output, or misaligning of ownership projections and, thus, did not contain the PBFs considered essential to the conservation of the species.

We further evaluated the polygons based on the PBFs for coastal marten and current land management practices under the Northwest Forest Plan (NWFP). We prioritized inclusion of Federal reserve lands and State lands occupied by the species at the time of listing because these lands contribute most to the conservation of the species, but also included those private lands that contain the PBFs essential to coastal marten conservation and which may require special management.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the coastal marten. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Due to unverifiable ownership and mapping information, some small portions of private or unclassified lands may occur within the mapping of Units 1, 2 and 3, but which were not intended for inclusion within the designation. These areas are extremely small artifacts of mapping discrepancies and potential overlapping data information, do not contain the PBFs considered essential to

the conservation of the species, and are not intended to be included as critical habitat as defined in this rule. Accordingly, any private lands in Units 1, 2, or 3 inadvertently included in the proposed designation are not considered critical habitat because they are part of inadvertent overlap or undeterminability and are too small to be significant for coastal marten conservation. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (i.e., currently occupied) and that contain one or more of the physical or biological features that are essential to support life-history processes of the species.

Units are proposed for designation based on one or more of the physical or biological features being present to support the coastal marten's life-history processes. Some units contain all of the identified physical or biological features and support multiple life-history processes. Some units contain only some of the physical or biological features necessary to support the coastal marten's particular use of that habitat.

The proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under **Proposed Regulation Promulgation**. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on <http://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0151 and on our Internet site, <https://www.fws.gov/arcata>.

### **Proposed Critical Habitat Designation**

We are proposing five units as critical habitat for the coastal marten. The critical

habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the coastal marten. Table 3 below identifies all of the units within the geographical area occupied at the time of listing that contain the physical or biological features that support multiple life-history processes for the coastal marten and are thus essential to the conservation of the species.

TABLE 3. PROPOSED CRITICAL HABITAT UNITS FOR PACIFIC MARTEN (COASTAL DPS). [Area (acres (hectares)) reflects all land within critical habitat unit boundaries and includes area that may not contain PBFs].

Unit Number and Name	Ownership (in acres (hectares))				Total
	Federal	State	Tribal	Other	
Unit 1: OR–1 Siuslaw	94,094 (37,673)	2,124 (859)	0	0	95,218 (38,534)
Unit 2: OR–2 Siltcoos	8,582 (3,472)	249 (101)	0	0	8,830 (3,574)
Unit 3: OR–3 Coos Bay	14,934 (6,044)	648 (262)	0	0	15,582 (6,306)
Unit 4: OR–4 Cape Blanco	1,021 (413)	3,025 (1,224)	0	0	4,046 (1,637)
Unit 5: OR– CA–5 Klamath Mountains	1,154,197 (467,103)	19,829 (8,024)	26,126 (10,573)	89,475 (36,210)	1,289,627 (521,913)
Totals	1,271,828 (514,708)	25,875 (10,471)	26,126 (10,573)	89,475 (36,210)	1,413,305 (571,965)

Note: Area sizes may not sum due to rounding. “Other” represents, city, county, private or otherwise unidentified land ownership areas.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the coastal marten, below.

*Unit 1: Siuslaw Unit. Lincoln and Lane Counties, Oregon*

This unit consists of approximately 95,218 ac (38,534 ha) and encompasses the northern portion of the central coastal Oregon population of coastal martens. Almost all of the unit is within Lane County, north of Oregon Highway 126, but a small portion extends north into Lincoln County, Oregon, on lands managed by the Siuslaw National Forest. The unit mostly borders the Pacific Ocean from just south of the town of Yachats, south to near Sea Lion Caves; further inland, the unit extends as far south as Mercer

Lake. Portions of the unit extend inland from the coast as much as 18 mi (29 km), but most of the unit is within 12 mi (19 km) of the coast. The unit is almost entirely in Federal ownership (94,094 ac (37,675 ha)) (99 percent), specifically the Siuslaw National Forest, with approximately 74,899 ac (30,311 ha) in Late-Successional Reserve (LSR) land use allocation under the NWFP (USFS 1994, entire). Rock Creek and Cummins Creek Wilderness Areas make up much of the rest of the Federal lands. Oregon State Park lands along the coast comprise most of the remainder of the unit (2,124 ac (859 ha)), including Neptune, Heceta Head, Washburne, and Ponsler State Parks. Recreation is a principal land use in this unit. Because the Federal lands are in an LSR allocation, forest management is limited to activities that are neutral or beneficial to the retention or development of late-successional forest conditions.

This unit was occupied at the time of listing (2020), is currently occupied by coastal martens, and contains one or more of the physical or biological features essential to the conservation of the species. This unit represents the northernmost distribution of coastal martens in Oregon (based on contemporary detections), as well as relatively unfragmented old forest compared to other forests near the ocean within the DPS. This area may facilitate movement of coastal martens inland. This unit provides all of the features described in PBFs 1 and 2. Overstory conditions as described in PBF 1 are mostly associated with high-productivity sites across much of this unit, characteristic of the mature forests of the Sitka spruce vegetation zone as described in Franklin and Dyrness (1988, pp. 58–59).

The habitat-based threats in this unit that may require special management include removal of forest vegetation, primarily through vegetation management such as timber harvest. Approximately 80 percent of the Federal portion of this unit is managed as a Late Successional Reserve, which requires retaining or developing late-successional conditions that could be suitable for coastal martens. However, some treatments that meet

LSR standards and guidelines, such as thinning to increase tree size or stand complexity, can result in loss of dense understories that are valuable to coastal martens to escape from predators and provide suitable prey habitat. We have not identified potential exclusions at this time, but may consider information regarding potential exclusions provided during the comment period for this proposal.

*Unit 2: Siltcoos Unit. Lane and Douglas Counties, Oregon*

This unit consists of approximately 8,830 ac (3,574 ha) and encompasses the central portion of the central coastal Oregon population of coastal martens in coastal Lane and Douglas Counties, Oregon. The unit occurs along the coastline west of Highway 101 and extends from near the city of Florence, Oregon, south approximately 12 mi (19 km) to the vicinity of Tahkenitch Creek, west of Tahkenitch Lake. Land ownership within the unit includes approximately 8,582 ac (3,472 ha) of Federal and 249 ac (101 ha) of State land. The Federal portion is within the Oregon Dunes National Recreation Area, managed by the Siuslaw National Forest. The State portion comprises Honeyman State Park. Recreation is the principal land use in this unit, primarily All-Terrain Vehicle (ATV) use on the open dunes and forested trails within the recreation area and surrounding areas.

This unit was occupied at the time of listing (2020) and is currently occupied by coastal martens. Coastal martens in this unit and Unit 3 exhibit the highest densities and smallest home ranges documented in North America (Linnell *et al.* 2018, p. 13), indicating that the physical and biological features coastal martens require are widely available in this unit. The unit contains all of the components described in PBFs 1 and 2. For the forest overstory component of PBF 1, this unit falls into the less productive site category, due to the harsher growing conditions along the Oregon coast. Forest vegetation in this unit generally comprises dense strands of shore pine with extremely dense shrub understories, as described in Franklin and Dyrness (1988, pp. 291–294). This unit

encompasses one of four known coastal marten populations, allowing for maintaining redundancy across the DPS. Coastal martens in this unit and Unit 3 are generally isolated from coastal martens in the rest of the DPS, with limited ability to connect populations across the landscape.

The habitat-based threats in this unit that may require special management include possible loss of shore pine and understory shrub habitat in an effort to restore movement of coastal sand dunes or increase open areas for recreation vehicles. An additional threat is the invasion of nonnative shrub species (e.g., Scotch broom (*Cytisus scoparius*)) that may preclude the development of ericaceous shrubs and shore pine that are known components of suitable coastal marten habitat. We have not identified potential exclusions at this time, but may consider information regarding potential exclusions provided during the comment period for this proposal.

*Unit 3: Coos Bay Unit. Douglas and Coos Counties, Oregon*

This unit consists of approximately 15,582 ac (6,306 ha) and encompasses the southern portion of the central coastal Oregon population of coastal martens in coastal Douglas and Coos Counties, Oregon. The unit extends from Winchester Bay south to the north spit of Coos Bay proper, and lies west of U.S. Highway 101. Land ownership includes 14,934 ac (6,044 ha) of Federal and 648 ac (262 ha) of State land. The Federal portion is within the Oregon Dunes National Recreation Area, managed by the Siuslaw National Forest. The State portion comprises Umpqua Lighthouse State Park. This unit is otherwise similar to Unit 2 in terms of primary land use, coastal marten occupancy, presence of physical and biological features, vegetation description, essentiality of conservation, and habitat based threats. Recreation is the principal land use in this unit, primarily ATV use on the open dunes and forested trails within the recreation area and surrounding areas.

This unit was occupied at the time of listing (2020) and is currently occupied by

coastal martens. Coastal martens in this unit, along with Unit 2, exhibit the highest densities and smallest home ranges in North America (Linnell *et al.* 2018, p. 13), indicating that the physical and biological features coastal martens require are widely available in this unit. The unit contains all of the components described in PBFs 1 and 2. For the forest overstory component of PBF 1, this unit falls into the less productive site category, due to the harsher growing conditions along the Oregon coast. Forest vegetation in this unit generally comprises dense strands of shore pine with extremely dense shrub understories, as described in Franklin and Dyrness (1988, pp. 291–294). This unit encompasses one of four known coastal marten populations, allowing for maintaining redundancy across the DPS. Coastal martens in this unit and Unit 2 are generally isolated from coastal martens in the rest of the DPS, with limited ability to connect populations across the landscape.

The habitat-based threats in this unit that may require special management include addressing the possible loss of shore pine and understory shrub habitat in an effort to restore movement of coastal sand dunes or increase open areas for recreation vehicles. An additional threat is the invasion of nonnative shrub species (e.g., Scotch broom) that may preclude the development of ericaceous shrubs and shore pine that are known components of suitable coastal marten habitat. Loss of habitat adjacent to the unit as a result of the Jordan Cove liquefied natural gas project will reduce connection capacity with coastal martens detected on the north spit to the south (Service 2020, pp. 46–50). We have not identified potential exclusions at this time in this unit, but may consider information regarding potential exclusions provided during the comment period for this proposal.

#### *Unit 4: Cape Blanco Unit. Coos and Curry Counties, Oregon*

This unit consists of approximately 4,046 ac (1,637 ha) and encompasses the immediate coastal portion of the southern coastal Oregon population of coastal martens in



coastal Coos and Curry Counties, Oregon. The unit extends from just south of the Bandon State Natural Area, south to Cape Blanco State Park, and lies west of U.S. Highway 101. Land ownership includes 1,021 ac (413 ha) of Federal and 3,025 ac (1,224 ha) of State land. The Federal portion is managed by the Bureau of Land Management (BLM) as a District Designated Reserve with no programmed timber harvest; portions of the reserve are managed for recreation, while other portions are managed as the New River Area of Critical Environmental Concern to protect and conserve natural resources. The State portion comprises Cape Blanco State Park and Floras Lake State Natural Area. Recreation is the principal land use in this unit.

This unit was occupied at the time of listing (2020) and is currently occupied by coastal martens and contains one or more of the components described in PBFs 1 and 2 that are essential to the conservation of the species. The unit is a mix of shore pine dominated forests in the lowlands near the ocean, and more mature Sitka spruce forest in the higher bluffs around Cape Blanco. This unit encompasses occupied coastal forest that is known to be suitable habitat for coastal martens.

The habitat-based threats in this unit that may require special management are the prevalence of invasive shrub species that may preclude the development of ericaceous shrubs and shore pine that are known components of suitable coastal marten habitat. We have not identified potential exclusions at this time, but may consider information regarding potential exclusions provided during the comment period for this proposal.

*Unit 5: Klamath Mountains Unit. Coos, Curry, Douglas, and Josephine Counties, Oregon. Del Norte, Humboldt, and Siskiyou Counties, California*

This unit consists of approximately 1,289,627 ac (521,913 ha) and occurs mostly within the Klamath Mountains of southwestern Oregon and northwestern California. Within Oregon, the unit occurs in the southern part of Coos County, just south of Powers, Oregon, and extends south through eastern Curry and western Josephine Counties, with

the northeastern fringe of the unit extending into Douglas County. The northwestern portion of this unit consists of a non-contiguous portion that encompasses Humboldt Mountain State Park. The unit extends south into California, occupying much of the eastern portion of Del Norte County, extending south into Humboldt County and east into Siskiyou County. In California, the unit lies west of U.S. Highway 96 and extends all the way to the Pacific Ocean in northern Humboldt County, encompassing Redwood National and State Parks. The unit is 89 percent federally owned (1,154,197 ac (467,103 ha)), with an additional 19,829 ac (8,024 ha) of State lands, 26,126 ac (10,573 ha) of Tribal lands, and the remainder (89,475 ac (36,210 ha)) owned by private or local governments. The USFS is the principal Federal land manager (Rogue River-Siskiyou, Six Rivers, and Klamath National Forests), with the BLM managing additional lands in Oregon, and the National Park Service in California. LSRs account for 46 percent of the Federal ownership. In addition, several Wilderness Areas are within this unit, including Grassy Knob, Wild Rogue, Copper Salmon, and Kalmiopsis in Oregon, and the Siskiyou Wilderness in California.

This unit was occupied at the time of listing (2020) and is currently occupied by coastal martens and contains one or more of the physical or biological features essential to the conservation of the species. This unit represents the southernmost distribution of coastal martens in the DPS and encompasses the majority of known coastal marten detections. Outside of the northern portion of Unit 1, it also is the only source of non-shore pine habitat, and includes a variety of vegetation conditions that coastal martens use, enhancing representation. This unit contains key connectivity areas for coastal martens to move either north or south in the DPS, as well as inland or towards the coast. This unit provides all of the features described in PBFs 1 and 2. Overstory conditions as described in PBF 1 are associated with high productivity sites across much of the unit, but low-productivity serpentine sites also occur across this unit.

The habitat-based threats in this unit that may require special management include removal of forest vegetation, primarily through vegetation management such as timber harvest. Fuels management to reduce the risk of fire is also a regular activity throughout much of this unit. We have identified potential exclusions for some private and Tribal lands in this unit (see **Exclusions**). These potential exclusions include 76,544 ac (30,975 ha) of private land and 26,126 ac (10,573 ha) of Tribal land in the California portion of the unit.

## **Effects of Critical Habitat Designation**

### *Section 7 Consultation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of

Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded or authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or

adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinstitute formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new species or designated critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinstitute consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

#### *Application of the "Destruction or Adverse Modification" Standard*

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying

such habitat, or that may be affected by such designation.

The scale and context of activities are particularly important in evaluating the potential effects on coastal marten habitat. The degree to which management activities are likely to affect the capability of critical habitat to support coastal martens will vary depending on factors such as the scope and location of the action, and the quantity of critical habitat affected. Activities that the Service may, during a consultation under section 7(a)(2) of the Act, be considered likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would remove, manipulate, degrade, or destroy coastal marten habitat at such a magnitude that the entirety of the designated critical habitat would no longer serve its intended value of providing for conservation of the species. Activities that could result in such an impact could include very large-scale mechanical (including controlled fire), chemical, or biological (biocontrol agents) actions that may cause significant reductions in the amount, extent, or quality of habitat available to coastal martens for resting, denning, feeding, breeding, sheltering, and dispersing. While we are currently unaware of any planned activities involving Federal actions that could reach this magnitude of impact to the essential physical or biological features, known activities that have the potential to impact components of these features include timber sales, vegetation management, hazard tree removal, salvage of large areas of trees killed by fire or other mortality source, noxious weed treatments, forest pest and disease management, fire management including fire suppression and fuel reduction treatments, forest and aquatic restoration projects, activities conducted under mining permits, activities conducted under travel management plans (e.g., road maintenance, construction, and decommissioning), cleaning up and restoring unauthorized cannabis cultivation sites, recreation and visitor services projects and site development, communication projects and other infrastructure projects. Federal agencies likely to engage with the Service on these

activities include the USFS, BLM, National Park Service, and Bureau of Indian Affairs.

(2) Actions in relation to the Federal highway system, as regulated by the U.S. Department of Transportation, that would remove, fragment, manipulate, degrade, or destroy coastal marten habitat at such a magnitude that the entirety of the designated critical habitat would no longer serve its intended value of providing for conservation of the species. While we are currently unaware of any planned activities involving the Federal highway system that could reach this magnitude of impact to the essential physical or biological features, known activities that have the potential to impact components of these features include very large-scale road and bridge construction and right-of-way designation, maintenance or improvements of existing highways, and other infrastructure projects. These activities could remove, fragment, or reduce the amount, extent, or quality of habitat needed by coastal martens for resting, denning, feeding, breeding, sheltering, and dispersing.

(3) Actions regulated by the Federal Energy Regulatory Commission, which are energy development projects that would remove, manipulate, degrade, or destroy coastal marten habitat at such a magnitude that the entirety of the designated critical habitat would no longer serve its intended value of providing for conservation of the species. While we are currently unaware of any planned activities involving Federal actions that could reach this magnitude of impact to the essential physical or biological features, known energy development projects that have the potential to impact components of these features could include, but are not limited to, very large-scale powerlines, liquefied natural gas pipelines and terminals, and solar and wind farms. These activities could remove or reduce the amount, extent, or quality of habitat needed by coastal martens for resting, denning, feeding, breeding, sheltering, and dispersing.

## **Exemptions**

### *Application of Section 4(a)(3) of the Act*

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: “The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.” There are no Department of Defense (DoD) lands with a completed INRMP within the proposed critical habitat designation.

### **Consideration of Exclusions Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

### *Consideration of Economic Impacts*

Section 4(b)(2) of the Act and its implementing regulations require that we



consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.”

The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum

(IEM) (Service 2019b, entire) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the coastal marten (Industrial Economics (IEc) 2020, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. If there are any unoccupied units in the proposed critical habitat designation, the screening analysis assesses whether any additional management or conservation efforts may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM are what we consider our draft economic analysis (DEA) of the proposed critical habitat designation for the coastal marten; our DEA is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are

available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the coastal marten, first we identified, in the IEM dated October 22, 2019, probable incremental economic impacts associated with the following categories of activities: (1) timber harvest activities; (2) wildfire or wildfire suppression activities; (3) road construction activities; (4) remediation of unauthorized cannabis cultivation sites; and (5) habitat restoration activities. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the coastal marten is present, Federal agencies already are required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (i.e., difference between the jeopardy and adverse modification standards) for the coastal marten's critical habitat. Because the designation of critical habitat for coastal marten is being proposed nearly concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat.

However, the following specific circumstances in this case help to inform our evaluation:

(1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the coastal marten may also be likely to adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the coastal marten is made up of five units, four within Oregon and one along the Oregon border extending south into California. All of the units are occupied by the coastal marten. The amount of area being proposed within each unit along with ownership information is summarized in Table 3 (see **Proposed Critical Habitat Designation**). Federal land makes up 90 percent of the total proposed designation (Table 3). As a result, a large percentage of the designation would be subject to a Federal nexus and section 7 consultation. Approximately 81 percent of the Federal lands are specifically managed by the USFS. A number of existing land use and management plans exist within proposed critical habitat that may provide benefits to coastal marten critical habitat. In particular, USFS lands proposed as critical habitat are managed under the Northwest Forest Plan, which entails a network of late-successional reserve land-use allocations to be managed for the retention and development of late-successional forest that may benefit habitat for coastal martens. In addition, most proposed BLM lands are included in reservation allocations where programmed timber harvest does not occur.

Because the proposed units are occupied, any actions that may affect the species

or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the coastal marten. Therefore, only administrative costs associated with an adverse modification analysis are expected in approximately 90 percent of the proposed critical habitat designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

In addition, nearly 48 percent of the proposed designation for coastal marten overlaps with existing critical habitat for the endangered marbled murrelet (*Brachyramphus marmoratus*), threatened northern spotted owl (*Strix occidentalis caurina*), threatened Oregon silverspot butterfly (*Speyeria zerene hippolyta*), and the threatened Pacific coast population of the western snowy plover (*Charadrius nivosus nivosus*) (IEc 2020, Exhibit A-1, p. 18). Although the western snowy plover's and Oregon silverspot butterfly's habitat needs are distinctly different than the coastal marten's, the overall habitat needs of both the marbled murrelet and northern spotted owl would provide at least some overlap in maintaining appropriate forested habitat. The overlap between the murrelet and northern spotted owl make up the majority (42 percent) of critical habitat overlap with the coastal marten. As a result, any consultation requirements for listed species and resulting costs would be at least partially split between each overlapped species with not one species being the sole source of the entire costs.

The entities most likely to incur incremental costs are parties to section 7 consultations, including Federal action agencies and, in some cases, third parties, most frequently State agencies or Tribes. Because the proposed critical habitat designation

includes other lands not owned by Federal, State, or Tribal governments, incremental costs arising from public perception of the designation have some potential to arise; however, these non-governmental lands make up only a small portion (6.3 percent) of the proposed designation. Further, there do not appear to be significant development pressures in the area. We are not aware of any Tribal, State, or local government regulations or requirements that could be triggered by the designation of critical habitat for the coastal marten and attribute any change in behavior from private entities to be associated with public perception or attitudes rather than any specific requirements. Based on coordination efforts with Tribal partners and State and local agencies, the cost to private entities within these sectors is expected to be relatively minor (administrative costs of less than \$10,000 per consultation effort); they, therefore, would not be significant.

Our analysis of economic costs estimates that considering adverse modification of coastal marten critical habitat during section 7 consultation will result in incremental costs of approximately \$280,000 (2018 dollars) per year. The incremental administrative burden resulting from the designation of critical habitat for the coastal marten will not reach \$100 million in a given year based on the estimated annual number of consultations and per-unit consultation costs. The designation is unlikely to trigger additional requirements under State or local regulations and is not expected to have perceptual effects to third parties.

We are soliciting data and comments from the public on the DEA discussed above, as well as all aspects of this proposed rule and our required determinations. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts received during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and

our implementing regulations at 50 CFR 424.19. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

#### *Consideration of National Security Impacts*

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the coastal marten are not owned, managed, or used by the Department of Defense or Department of Homeland Security; therefore, we anticipate no impact on national security or homeland security as a result of the designation.

However, during the development of a final designation, we will consider any additional information received through the public comment period on the impacts of the proposed designation on national security or homeland security to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

#### *Consideration of Other Relevant Impacts*

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs), or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of Tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

When identifying the benefits of inclusion for an area, we consider the additional

regulatory benefits that area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation, or in the continuation, strengthening, or encouragement of partnerships.

In the case of the coastal marten, the benefits of critical habitat include public awareness of the presence of the coastal marten and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the coastal marten due to protection from destruction or adverse modification of critical habitat. Additionally, continued implementation of an ongoing management or conservation plan that provides equal to or more conservation than a critical habitat designation would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a management or conservation plan when considering the benefits of inclusion. We consider a variety of factors, including, but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information or changing conditions.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the



benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

*Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General*

We sometimes exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat, and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement, or in partnership with the Service.

We evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary section 4(b)(2) exclusion analysis. A non-exhaustive list of factors that we will consider for non-permitted plans or agreements is shown below. These factors are not required elements of plans or agreements, and all items may not apply to every plan or agreement.

- (i) The degree to which the plan or agreement provides for the conservation of the species or the essential physical or biological features (if present) for the species.
- (ii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented.
- (iii) The demonstrated implementation and success of the chosen conservation measures.

(iv) The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

(v) The extent of public participation in the development of the conservation plan.

(vi) The degree to which there has been agency review and required determinations (e.g., State regulatory requirements), as necessary and appropriate.

(vii) Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) compliance was required.

(viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

#### Green Diamond Resource Company Lands; Unit 5 Klamath Mountains

The Green Diamond Resource Company (GDRC) owns and manages approximately 76,544 ac (30,976 ha) of lands included in the proposed designation for the coastal marten in California. Using the criteria described under *Criteria Used To Identify Critical Habitat*, we have determined that these lands are essential to the conservation of the species.

The GDRC has developed an MOU with the Service (GDRC-Service 2020, entire) and a State Safe Harbor Agreement (SHA) with the California Department of Fish and Wildlife (CDFW 2018, entire) to assist in conservation of the coastal marten and its habitat. Conservation measures identified for the coastal marten and its habitat in the MOU and State SHA include:

- Engage in survey, monitoring, reporting, and coordination efforts for coastal marten.

- Provide funding and technical support for assisted coastal marten dispersal actions.
- Develop and implement a coastal marten training program.
- Establish a 127,217 ac “Marten Special Management Area” with a 2,098 ac reserve.
- Create slash piles to benefit coastal marten and provide habitat around natal dens.
- Implement avoidance and minimization measures for GDRC actions in coastal marten habitat.
- Discourage and prevent unauthorized cannabis cultivation and use of pesticides.
- Implement adaptive management strategies for conservation of coastal marten and its habitat.
- Designate an internal compliance team and MOU Coordinator to oversee coastal marten conservation through the MOU and SHA.
- Provide access to GDRC lands to State and Service staff to verify compliance of agreements.
- Retain live and snag tree habitat components to benefit coastal marten (Retention Scorecard) and their habitat.

In addition, the GDRC has been and continues to be a member of a multi-agency management group for conservation of the coastal marten in California and Oregon. The group has developed a conservation strategy and management plan for conserving the coastal marten in California (Slauson *et al.* 2019a, entire). The conservation strategy was developed to address coastal marten declines and synthesizes current knowledge on the species and identifies current threats, management goals, and outlines numerous conservation actions and information needs. The implementation of the conservation

measures outlined in the strategy would assist in conserving the species and its habitat.

We have determined that the conservation measures and management actions identified above being undertaken by GDRC will conserve and manage coastal marten habitat including the species' PBFs and that these actions meet our criteria for exclusion under section 4(b)(2) of the Act. Based on GDRC working with the Service and the CDFW on development and implementation of the MOU and State SHA that benefit coastal marten habitat, involvement and development of the conservation strategy, and its continued partnership with us in coastal marten conservation, we are considering excluding GDRC lands from the final designation. We will continue to work with the GDRC throughout the public comment period and during development of the final designation of critical habitat for the coastal marten and are seeking comment on whether the existing management and conservation efforts of GDRC meet our criteria for exclusion from the final designation under section 4(b)(2) of the Act.

#### *Tribal Lands*

Several Executive Orders, Secretarial Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both the Service and the National Marine Fisheries Service (NMFS), Secretarial Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to our relationships with Tribes and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in

the listing process, including designation of critical habitat. The Order also states:

“Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.” In light of this instruction, when we undertake a discretionary section 4(b)(2) exclusion analysis, we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat, nor does it state that Tribal lands or waters cannot meet the Act’s definition of “critical habitat.” We are directed by the Act to identify areas that meet the definition of “critical habitat” (i.e., areas occupied at the time of listing that contain the essential physical or biological features that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries’ statutory authority.

#### Yurok Tribal Lands; Unit 5 Klamath Mountains

Approximately 26,126 ac (10,573 ha) of Yurok Tribal lands are included in the proposed designation of critical habitat for the coastal marten in Unit 5 in California. Using the criteria described under *Criteria Used To Identify Critical Habitat*, we have determined that these Tribal lands are occupied by the coastal marten and contain the features essential to the conservation of the species.

The Yurok Tribe has a demonstrated track record of maintaining its lands for natural resources through implementation of their Yurok Forest Management Plan (FMP) (Yurok 2012, entire) and the Blue Creek Interim Management Plan (BCIMP) (Yurok

Tribe and Western Rivers Conservancy 2018, entire). The FMP and BCIMP identify management guidance for specific forest types to enhance and restore healthy, resilient riparian and old growth forests on Yurok Tribal lands. The FMP and BCIMP identify actions that contribute to the conservation of coastal forest habitat important to coastal marten including:

- Establishment of the Humboldt Marten Special Management Area (currently 10,906 ac).
- Surveys for coastal marten in and around project areas.
- Retention and enhancement of suitable reproductive habitat.
- Strategic habitat management to improve connectivity.
- Population monitoring combined with adaptive management to evaluate management effectiveness and prevent disease and predation.
- When appropriate, use of timber harvest, thinning, fuels reduction, and prescribed fire methods that avoid or minimize alteration of dense understory shrubs that are beneficial to coastal marten.
- Identification of stand management alternative to restore and enhance shrub cover where it has been lost or reduced.
- Maintenance of spatial database of coastal marten distribution.
- Nonnative and invasive species control and eradication.
- Fire and fuels management (including variable density thinning, shaded fuel breaks, cultural burning, and emergency rehabilitation).
- Development, testing, and creation of surrogate structures that meet key life-history needs for resting and denning to increase habitat suitability in the short term.

Additionally, we have begun coordination with the Yurok Tribe to assist in identifying additional management actions that may benefit the coastal marten or its habitat. The intent of the discussions is to ultimately develop an MOU with the Tribe to

further solidify our partnership with the Tribe in developing and implementing land management practices beneficial to the Tribe and the coastal marten. The current draft MOU identifies habitat management practices, habitat restoration, fuels reduction, and research opportunities that will benefit the coastal marten. The Yurok Tribe has also been and continues to be a member of a multi-agency management group for the conservation of coastal marten in California and Oregon. The group has developed a conservation strategy and management plan for conserving the coastal marten in California (Slauson *et al.* 2019a, entire). We will continue to work with the Tribe throughout the public comment period and during development of the final designation of critical habitat for the coastal marten to further develop and finalize the MOU and build on our existing partnership in implementing specific conservation measures for the coastal marten.

Based on existing conservation and management actions for natural resources by the Yurok Tribe, maintaining and strengthening our working relationship with the Tribe, and preliminary development of the coastal marten MOU with the Tribe, we are considering excluding the Yurok Tribal lands from the final designation. We are seeking comment on whether the Yurok Tribal lands are appropriate for exclusion from the final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act.

#### **Summary of Exclusions Considered Under 4(b)(2) of the Act**

Based on the information provided by entities whose lands we are considering for exclusion, as well as any additional public comments we receive, we will evaluate whether certain lands in Unit 5 of the proposed critical habitat are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise her discretion to exclude the lands from the final designation. We may also consider areas

not identified above for exclusion from the final critical habitat designation based on information we may receive during the public comment period.

We are considering whether to exclude the following areas under section 4(b)(2) of the Act from the final critical habitat designation for the coastal marten. Table 4 below provides approximate areas (ac, ha) of lands that meet the definition of critical habitat but for which we are considering possible exclusion under section 4(b)(2) of the Act from the final critical habitat rule. These areas include lands owned and managed by the Green Diamond Resource Company and the Yurok Tribe in California in Unit 5.

TABLE 4—AREAS CONSIDERED FOR EXCLUSION BY CRITICAL HABITAT UNIT (AC (HA))

Unit	Name	Areas Meeting the Definition of Critical Habitat in Ac (Ha)	Areas Considered for Possible Exclusion in Ac (Ha)	Rationale for Proposed Exclusion
5	Klamath Mountains	1,290,604 (573,058)	76,544 (30,975)	Existing Land Management, State Safe Harbor, MOU, Maintaining Partnership
			26,126 (10,573)	Existing Land Management, Draft MOU, Maintaining Partnership

## Required Determinations

### *Clarity of the Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and



(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

*Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*,

small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure

that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use, because these types of activities are not occurring and not expected to occur in areas being proposed as critical habitat. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that would impose an enforceable duty upon State, local, or Tribal governments with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or Tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify

critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments. The lands being proposed for critical habitat designation are owned by cities, Tribes, the State of California or Oregon, and the National Park Service, Bureau of Land Management, or the U.S. Forest Service. None of these government entities fits the definition of a “small governmental jurisdiction.” Therefore, a Small Government Agency Plan is not required.

#### *Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the coastal marten in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal

funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for coastal marten, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for State and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section

7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

*Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed areas of designated critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (42 U.S.C. 4321 et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with

designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the *Federal Register* on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

#### *Government-to-Government Relationship with Tribes*

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. The Yurok Tribe has lands identified in the proposed designation. We have coordinated with the Tribe in development of the SSA and will continue to work with the Yurok Tribe throughout the process of designating critical habitat for the coastal marten.

#### **References Cited**

A complete list of references cited in this rulemaking is available on the Internet at <http://www.regulations.gov> and upon request from the Arcata Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

#### **Authors**

The primary authors of this proposed rule are the staff members of the Fish and



Wildlife Service’s Species Assessment Team and the Arcata Fish and Wildlife Field Office and Oregon State Fish and Wildlife Service Office.

### List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

### Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

### PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

2. Amend § 17.11(h) by revising the entry for “Marten, Pacific [Coastal DPS]” under MAMMALS in the List of Endangered and Threatened Wildlife to read as follows:

#### § 17.11 Endangered and threatened wildlife.

\* \* \* \* \*

(h) \* \* \*

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
MAMMALS				
* * * * *	* * *			
Marten, Pacific [Coastal DPS]	<i>Martes caurina</i>	U.S.A. (CA (north-western), OR (western)).	T	85 FR 63806, 10/8/2020; 50 CFR 17.40(s). <sup>4d</sup> 50 CFR 17.95(a). <sup>CH</sup>
* * * * *	* * *			

3. In § 17.95, amend paragraph (a) by adding an entry for “PACIFIC MARTEN (*MARTES CAURINA*), COASTAL DPS” after the entry for “FLORIDA MANATEE (*TRICHECHUS MANATUS*)” to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

(a) *Mammals.*

\* \* \* \* \*

PACIFIC MARTEN (*MARTES CAURINA*), COASTAL DPS

(1) Critical habitat units are depicted for California and Oregon, on the maps below in this entry.

(2) Within these areas, the physical or biological features (PBFs) essential to the conservation of the Pacific marten (Coastal DPS) consist of the following components:

(i) Habitat that supports a coastal marten home range by providing for breeding, denning, resting, or foraging. This habitat provides cover and shelter to facilitate thermoregulation and reduce predation risk, foraging sources for marten prey, and structures that provide resting and denning sites. To provide cover and support denning, resting, and foraging, coastal martens require a mature forest overstory, dense understory development, and biologically complex structure that contains snags, logs, other decay elements, or other structures that support denning, resting, or marten prey. Stands meeting the conditions for PBF 1 would also function as meeting PBF 2 (facilitating movement within and between coastal marten home ranges). Stands meeting the condition for PBF 1 contain each of the following three components:

(A) *Mature, conifer-dominated forest overstory.* Overstory canopy cover provides protection to coastal martens from aerial and terrestrial predators, as well as shelter from physical elements such as sun or storms. It also is the source of structural features that coastal martens use for denning and resting, and provides suitable marten prey. Suitable overstory conditions vary depending on the productivity of the site as follows:

(1) For areas with relatively low productivity (e.g., areas where growing conditions are harsher, such as serpentine sites or coastal shore pine forests, compared to other areas), suitable forest overstory conditions are highly variable. They may contain a

sparse conifer overstory, such as in some serpentine areas, or a dense conifer overstory composed mainly of trees smaller than the typical older forest conditions described below in paragraph (2)(i)(B)(2) of this entry (e.g., the dense shore pine overstory found in areas occupied by marten along the Oregon coast).

(2) For other areas with higher productivity, martens tend to favor forest stands in the old-growth or late-mature seral stages. The specific forest composition and structure conditions found in higher productivity areas will vary by plant series and site class. Structural and composition descriptions of old-growth or late-mature seral stages for local plant community series should be used where available. In general these stands exhibit high levels of canopy cover and structural diversity in the form of:

- (i) A wide range of tree sizes, including trees with large diameter and height;
- (ii) Deep, dense tree canopies with multiple canopy layers and irregular tree crowns;
- (iii) High numbers of snags, including large-diameter snags; and
- (iv) Abundant down wood, including large logs, ideally in a variety of decay stages.

(B) *Dense, spatially extensive shrub layer.* The shrub layer should be greater than 70 percent of the area, comprising mainly shade-tolerant, long-lived, mast-producing species (primarily ericaceous species such as salal, huckleberry, or rhododendron, as well as shrub oaks). An extensive layer of dense shrubs provides protection and cover from coastal marten predators. In addition, ericaceous and mast-producing shrubs provide forage for marten prey.

(C) *Stands with structural features.* Structural features that support denning or resting, such as large down logs, rock piles with interstitial spaces, and large snags or live trees with decay elements or suitable resting structures (e.g., hollows and cavities, forked or broken tops, dead tops, brooms from mistletoe or other tree pathogens, or large

platforms including abandoned nests). These features provide cover and thermal protection for kits and denning females, and for all animals when they are resting between foraging bouts. Hence, these features need to be distributed throughout a coastal marten home range. They also tend to be among the largest structures in the stand. Many of these features, such as down logs and snags or live trees with decayed elements, also support coastal marten prey.

(ii) Habitat that allows for movement within home ranges among stands that meet PBF 1 or that supports individuals dispersing between home ranges. Habitat within PBF 2 includes:

(A) Stands that meet all three conditions of PBF1;

(B) Forest stands that meet only the first two components of PBF 1 (mature, conifer-dominated forest overstory and a dense, spatially extensive shrub layer); or

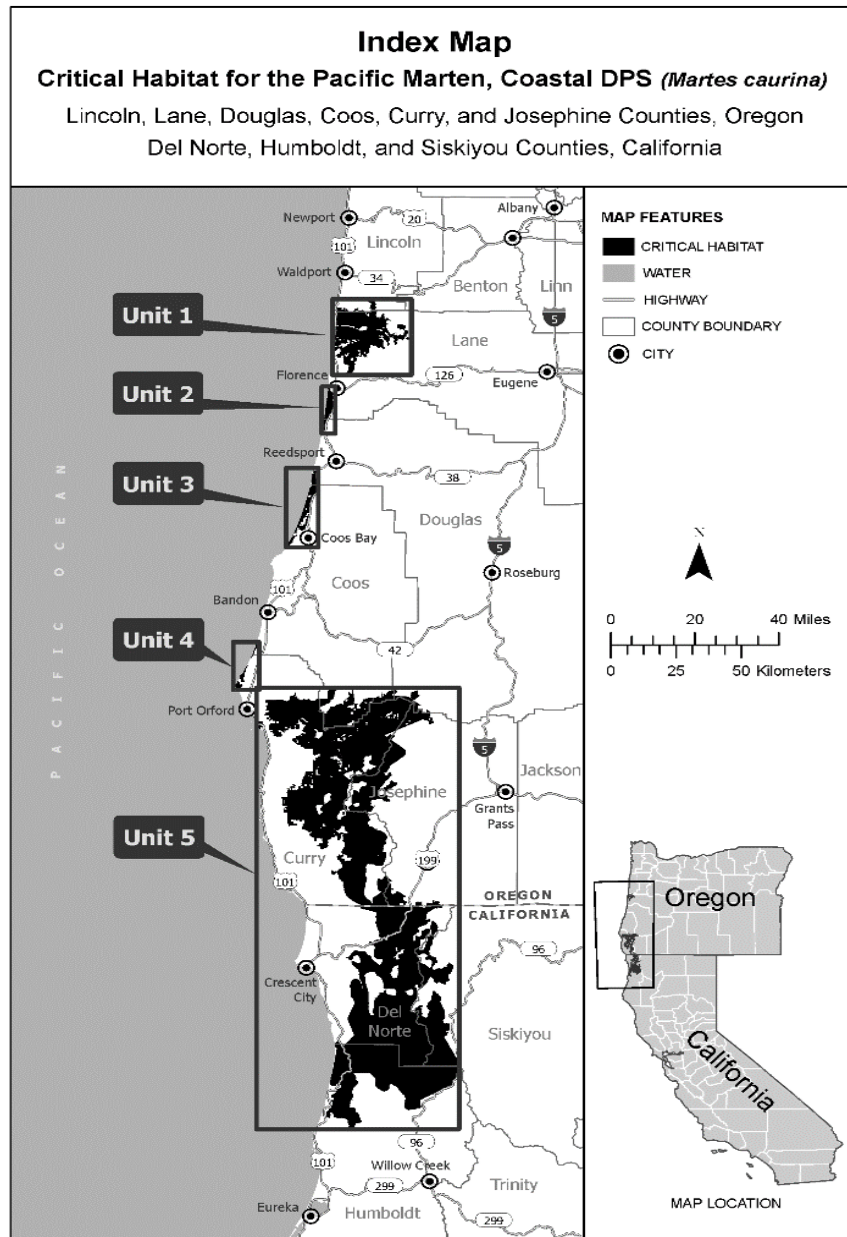
(C) Habitats with lesser amounts of shrub, canopy, or forest cover, or lesser amounts of smaller structural features as described in PBF 1, and while not meeting the definition of PBF 1, would still provide forage and cover from predators that would allow a coastal marten to traverse the landscape to areas of higher quality habitat.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved or hardened areas as a result of development) and the land on which they are located existing within the legal boundaries of the critical habitat units for the species on [EFFECTIVE DATE OF THE FINAL RULE]. Due to the scale on which the critical habitat boundaries are developed, some areas within these legal boundaries may not contain the physical or biological features and therefore are not considered critical habitat.

(4) *Critical habitat map units.* In the critical habitat map units, data layers defining map units were created using ArcGIS Pro 2.5.2 (Environmental Systems Research Institute, Inc. (ESRI)), a Geographic Information Systems (GIS) program. ESRI

base maps of world topographic, world imagery, and the program's world imagery USGS Imagery were used. Base map service was last refreshed April 2020. Critical habitat units were then mapped using North American Datum (NAD)1983, Albers. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Arcata Fish and Wildlife Office's Internet site at <http://www.fws.gov/arcata>, or on <http://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0151, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

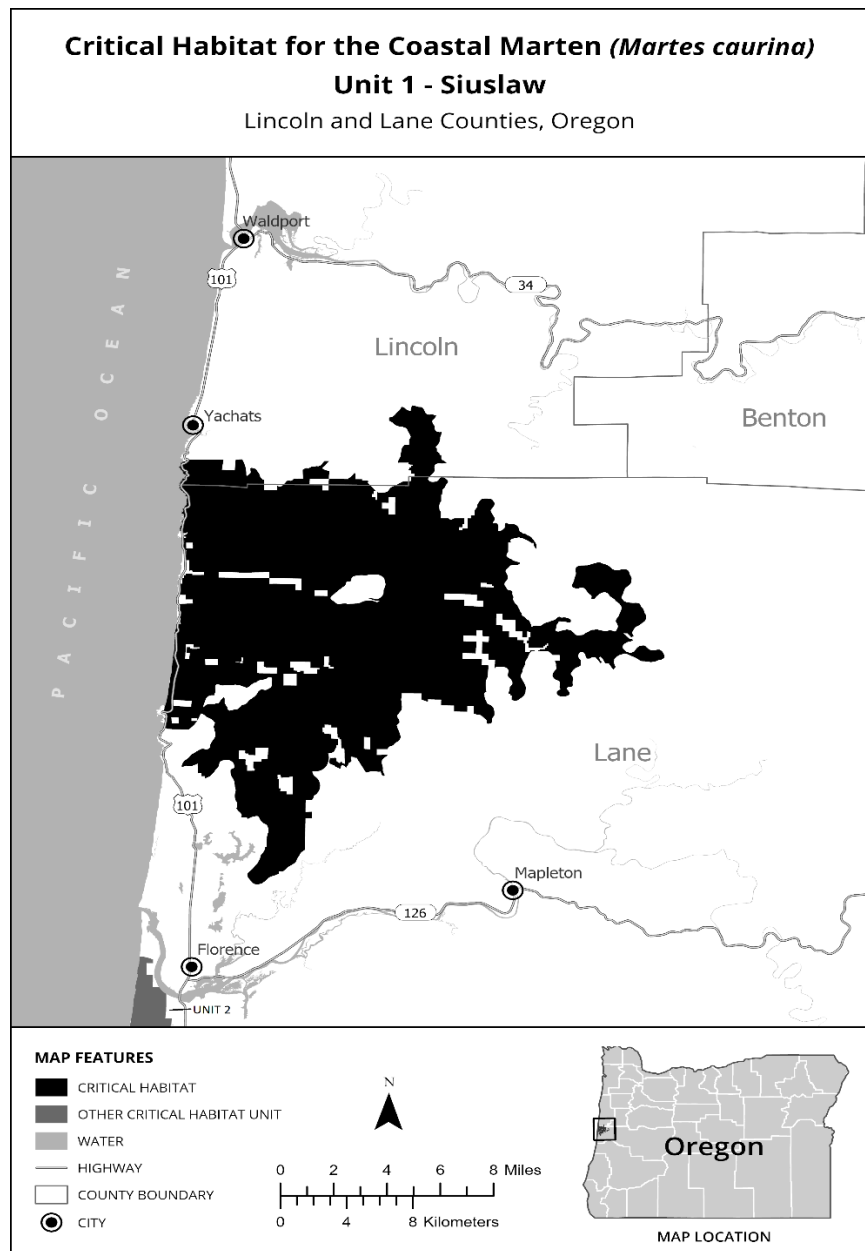
(5) *Note:* Index map for California and Oregon follows:



(6) Unit 1: Siuslaw Unit, Lincoln and Lane Counties, Oregon.

(i) General description: Unit 1 consists of 95,218 ac (38,543 ha) and comprises Federal (94,094 ac (37,673 ha)), State (2,124 ac (859 ha)), and less than 1 ac (1 ha) other lands.

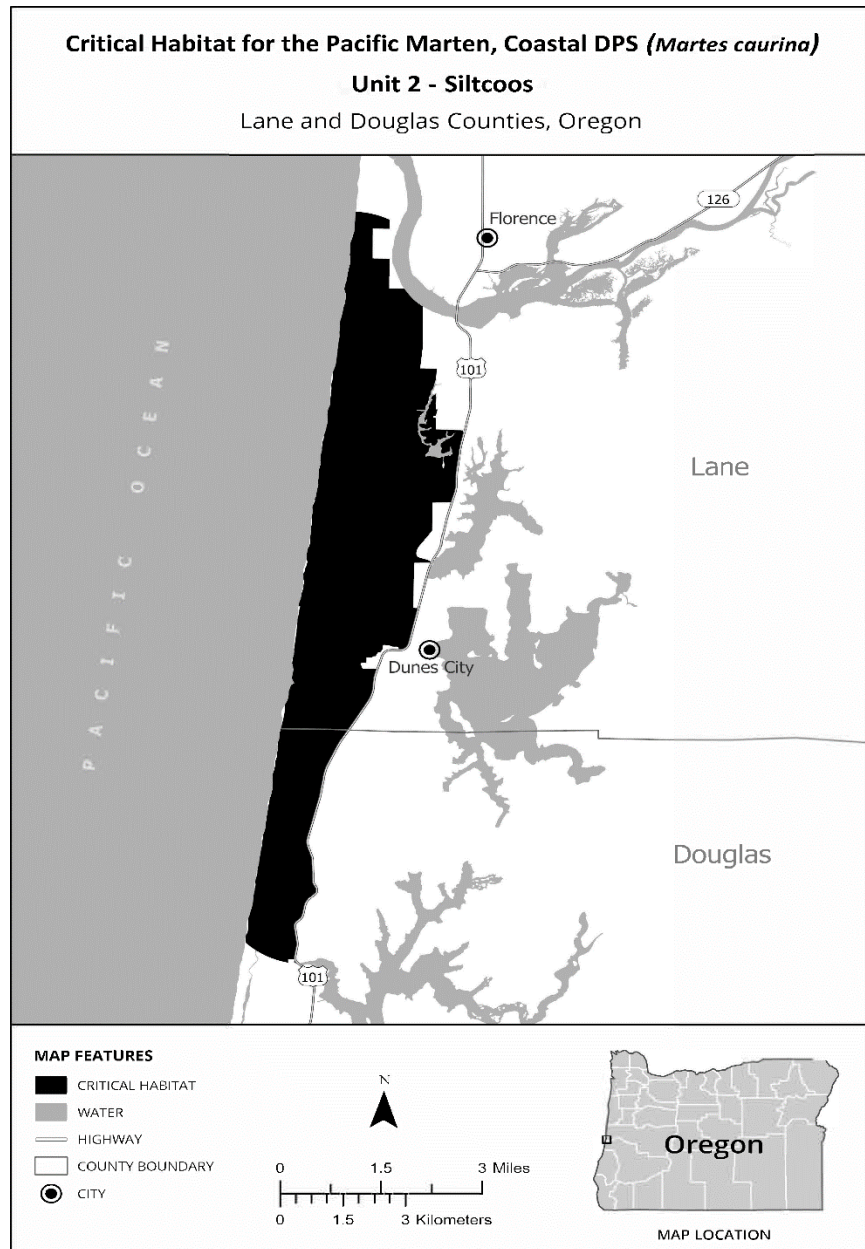
(ii) Map of Unit 1 follows:



(7) Unit 2: Siltcoos Unit. Lane and Douglas Counties, Oregon.

(i) General description: Unit 2 consists of 8,830 ac (3,574 ha) and comprises Federal (8,582 ac (3,472 ha)) and State (249 ac (101 ha)) lands.

(ii) Map of Unit 2 follows:

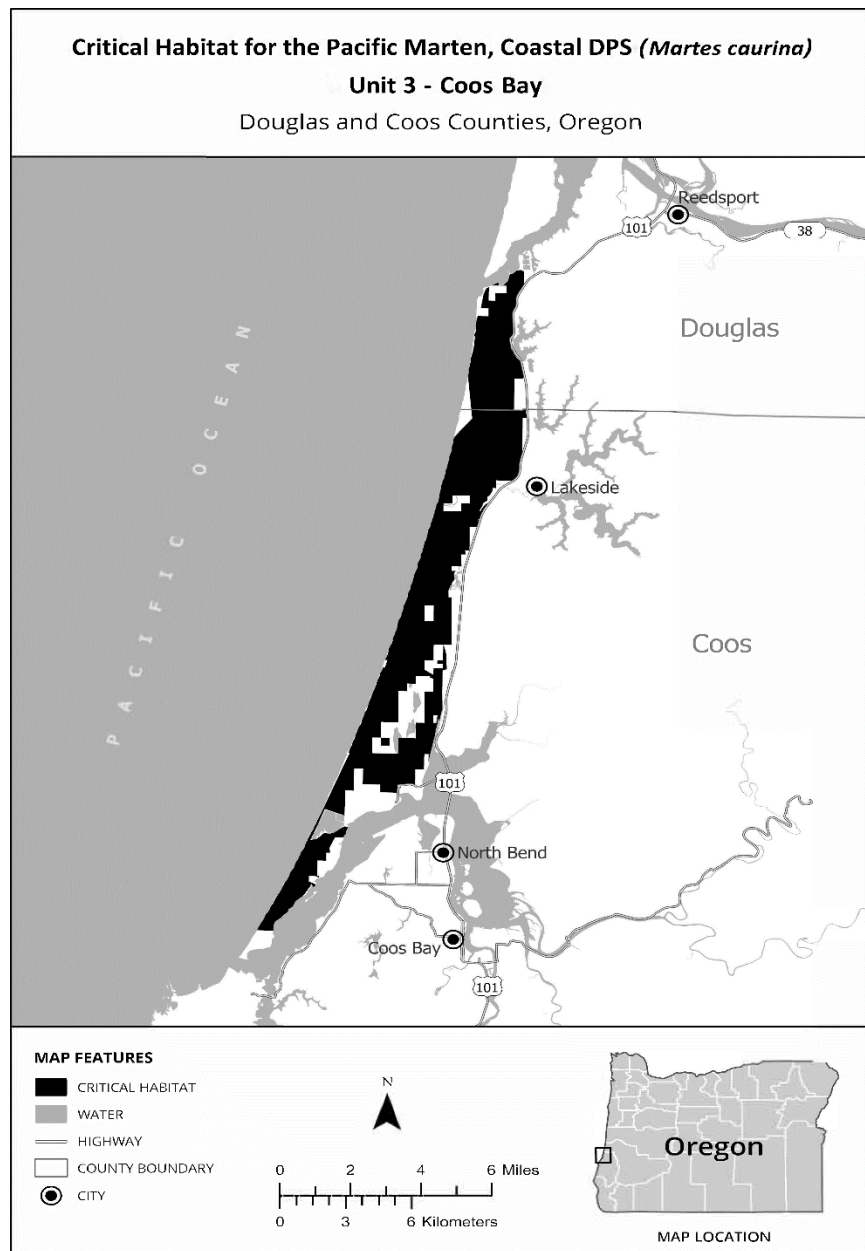


(8) Unit 3: Coos Bay Unit. Douglas and Coos Counties, Oregon.

(i) General description: Unit 3 consists of 15,582 ac (6,306 ha) and comprises Federal (14,934 ac (6,044 ha)) and State (648 ac (262 ha)) lands.

(ii) Map of Unit 3 follows:

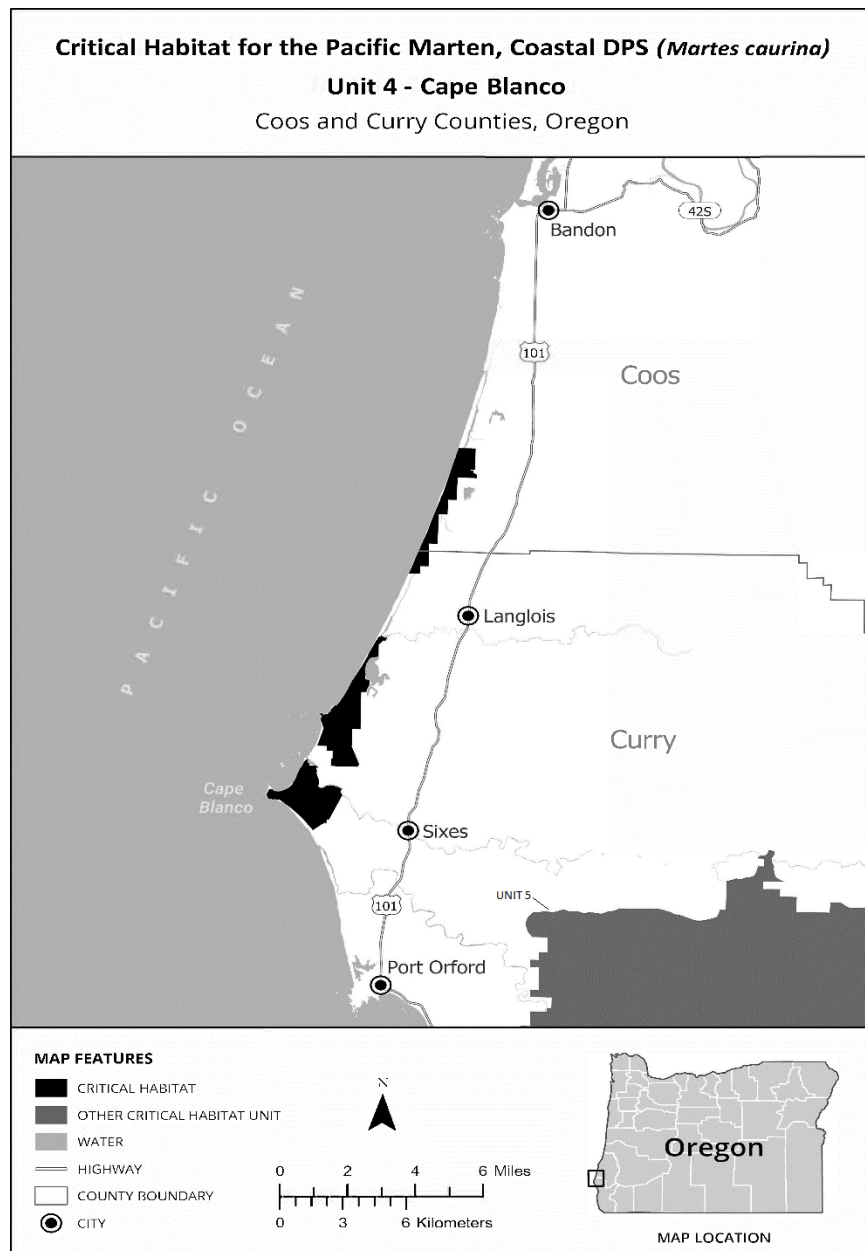




(9) Unit 4: Cape Blanco Unit. Coos and Curry Counties, Oregon.

(i) General description: Unit 4 consists of 4,046 ac (1,637 ha) and comprises Federal (1,021 ac (413 ha)) and State (3,025 ac (1,224 ha)) lands.

(ii) Map of Unit 4 follows:



(10) Unit 5: Klamath Mountains Unit. Coos, Curry, Douglas, and Josephine Counties, Oregon. Del Norte, Humboldt, and Siskiyou Counties, California.

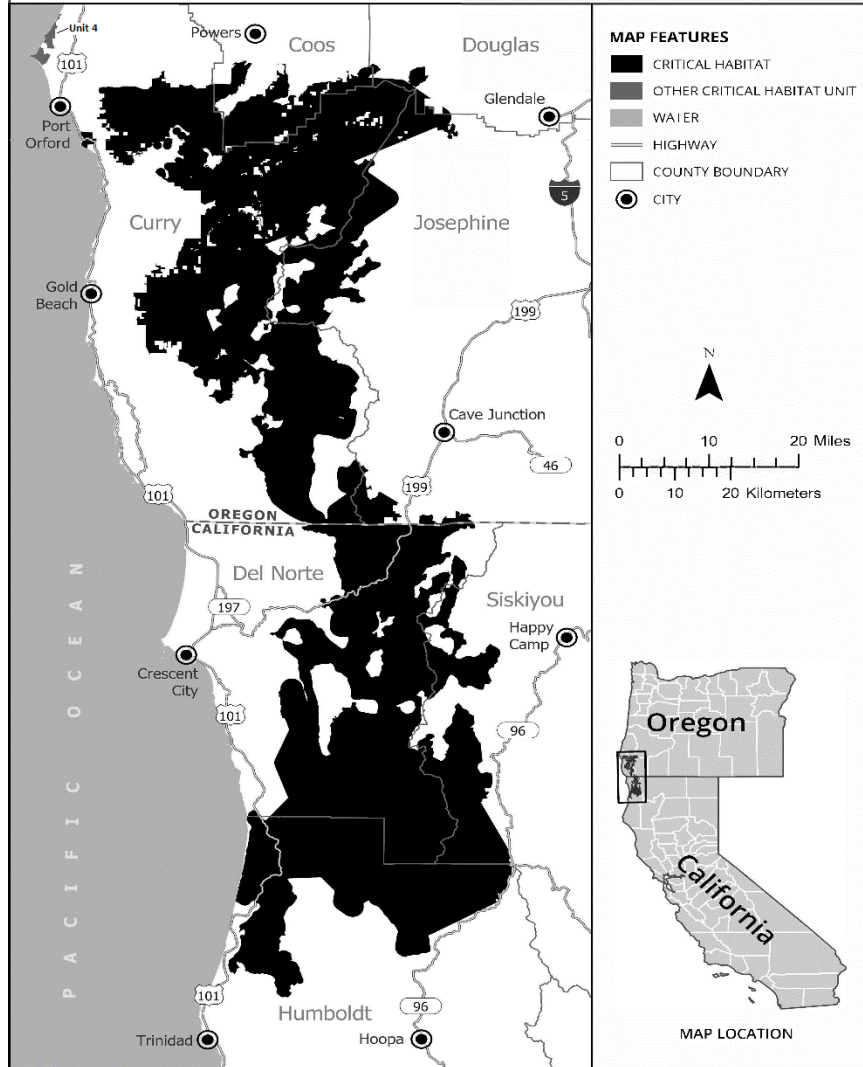
(i) General description: Unit 5 consists of 1,289,627 ac (521,913 ha) and comprises Federal (1,154,197 ac (467,103 ha)), State (19,829 ac (8,024 ha)), Tribal (26,126 ac (10,573 ha)), and private or undefined (89,475 ac (36,210 ha)) lands.

(ii) Map of Unit 5 follows:

## Critical Habitat for the Pacific Marten, Coastal DPS (*Martes caurina*)

### Unit 5 - Klamath Mountains

- Coos, Curry, Douglas, and Josephine Counties, Oregon
- Del Norte, Humboldt, and Siskiyou Counties, California



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**Martha Williams**

*Principal Deputy Director,*

*Exercising the Delegated Authority of the Director,*

*U.S. Fish and Wildlife Service.*

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